GILA RIVER INDIAN COMMUNITY

Governance Center

Office of the General Counsel

October 11, 2019

Mr. Michael B. Stoker
Regional Administrator
U.S. Environmental Protection Agency Region IX
75 Hawthorne St.
San Francisco, CA 94105-3901

Dear Mr. Stoker:

I am writing on behalf of the Gila River Indian Community (the Community) in response to your August 28, 2019 response to the Community's request for Government-to-Government consultation on the Arizona Department of Environmental Conservation's (ADEQ) potential assumption of the Clean Water Act (CWA) Section 404 permitting program in Arizona. Your response indicated that the Environmental Protection Agency (EPA) will engage in tribal consultation during the 120 day review period following receipt of the state's assumption package (which is anticipated in June 2020). The Community has grave concerns about EPA's delaying consultation, because doing so:

- Directly conflicts with EPA's obligations under EPA's 2011 *Policy on Consultation and Coordination with Indian Tribes* (Consultation Policy)[1] and *1984 Policy for the Administration of Environmental Programs on Indian Reservations* (1984 Policy);[2]

- Improperly delays consultation until well into the decision-making process, and after EPA has negotiated and executed a Memorandum of Agreement with ADEQ, which alone triggers the requirement for EPA to engage in Government-to-Government consultation;

- Improperly limits the timeframe for consultation given EPA's statutory 120-day decision-making deadline; and

- Risks adverse impacts to resources that the United States holds in trust for the benefit of the Community, including its Reservation Lands and Central Arizona Project (CAP) water allocation.

Moreover, while not expressly stated, the Community can only presume that EPA similarly intends to delay its compliance with Section 106 of the National Historic Preservation Act in connection with its federal undertaking of approving Arizona's Section 404 program. Given the significant

[1] *Available at* https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.
[2] *Available at* https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.

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agreements, EPA also must commence its Section 106 process prior to receiving ADEQ's assumption package.

Accordingly, the Community respectfully renews its request that EPA engage in Government-to-Government consultation with the Community, and that such consultation begin as soon as possible.

I. EPA's Consultation Policy and Trust Obligations Demand that EPA Engage in Government-to-Government Consultation Well in Advance of June 2022

The Supreme Court has made clear that as a federal agency EPA has "moral obligations of the highest responsibility and trust"[3] when dealing with tribal interests. Accordingly, EPA's Consultation Policy expressly states that "EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions *may affect* tribal interests."[4] Similarly, EPA's *1984 Policy* "assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect" tribes.[5]

Here, EPA approval of ADEQ's assumption request will affect the Community and its interests. A few of the significant interests that the Community would seek to address during consultation include:

- First, ADEQ's permitting of activities affecting the rivers, waterways, washes, and canals proximate to Community lands could result in changes in drainage patterns, increases in flooding, and diminished quality of waters entering the Reservation, which in turn impacts the Community's lands, natural resources, infrastructure, water rights, residences, and businesses. EPA's *1984 Policy* underscores the importance of consultation where decisions could impact reservation lands.[6]

- Second, ADEQ permitted activities could adversely impact federally protected historic and cultural resources (located both on- and off-Community lands) because ADEQ permits would no longer be subject to Section 106.

- Third, without the USACE as the Section 404 permitting entity, there is no federal agency "at the table" to regulate and protect impacts to the Community's trust resources, including its Reservation lands, resources, and CAP water, which is delivered via an off-Reservation conveyance system that ADEQ could seek to regulate.

- Fourth, protections to Community lands, waters, resources, and other interests through the United States' obligations to protect trust resources, conduct Government-to-

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[3] *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942).
[4] Consultation Policy at 1.
[5] 1984 Policy at ¶5.
[6] *See* 1984 Policy. One of the key principles of EPA's formal Policy on working with Tribes is that the agency "will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions affect reservation environments." *Id.* at ¶5. EPA has also stated that "[i]n keeping with the trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations." *Id.*

Government consultation, and consider public interest factors in issuing such permits, will no longer exist upon ADEQ assumption of the Section 404 permitting program.

Delaying consultation also flies in the face of EPA's obligation to consult early in the decision-making process. EPA's Consultation Policy states that "consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration."[7] Similarly, EPA Region IX's *Approach to Consultation with Tribal Governments* states that "regional staff should strive to initiate consultation as early in the decision process as is reasonably practical."[8]

Early consultation is necessary to ensure that EPA fully understands and properly considers the impacts and the trust implications of its decisions *during* the decision-making process, rather than at a later time when EPA and the State agency seeking to assume the Section 404 program have already concluded months of discussions and negotiations on what the State's program should entail. EPA's Consultation Policy seeks to ensure that EPA has the benefits of hearing and understanding tribal concerns with the very program and on the very issues that the EPA and the state are actively discussing and negotiating.

Delaying consultation also is not warranted on the grounds that ADEQ has not yet formulated its proposed program. In August 2019, ADEQ issued its *CWA and State Section 404 Roadmap* (Roadmap), which raises issues that are of great concern to the Community, and should raise (or have raised) similar concerns with EPA as the agency focuses on its tribal trust obligations. For example:

- ADEQ has stated that it can only consider effects that occur within Waters of the United States, allowing ADEQ to ignore direct consequences to tribal lands, infrastructure, historic and cultural resources, and burial sites that are located outside of a waterbody, but could be impacted or destroyed by erosion, flooding, or changes in drainage patterns caused by an ADEQ permitted activity;

- ADEQ interprets its authorizing legislation as prohibiting it from including procedures or protections beyond the minimum required by the Clean Water Act;

- ADEQ asserts that it cannot (or will not) consider any factors or impacts in its permit decision-making beyond the Section 404(b)(1) guidelines, including specifically the public interest analysis that considers impacts to tribes and historic and cultural resources; and

- Arizona law does not provide for, and therefore ADEQ cannot require, the State to mitigate or resolve adverse impacts to historic and cultural resources, and the protections that Arizona law does provide, apply to fewer such resources.

EPA's delaying consultation until receipt of an assumption submission would result in consultation occurring after EPA has negotiated and executed a Section 404 assumption program Memorandum of Agreement (MOA) with ADEQ, which in and of itself is an action requiring EPA to engage in Government-to-Government consultation. EPA regulations require any state "seeking to assume

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[7] Consultation Policy §5(C).

[8] p. 3, *available at* https://www.epa.gov/sites/production/files/2015-09/documents/consultation-approach-final.pdf.

a section 404 program to submit a Memorandum of Agreement executed by the [State] and the Regional Administrator."[9] This MOA is not inconsequential and could have significant negative implications for tribes (or conversely, could provide necessary protections for tribes), as the regulations require that the MOA address: any classes of permit for which the EPA waives its review authority; reporting and oversight requirements; and enforcement and compliance coordination. Indeed, EPA's 2011 Section 404 program assumption MOA with Michigan expressly addressed coordination with Tribes.

EPA's Consultation Policy specifies that "state or tribal authorizations or delegations" are among the types of EPA activities that are appropriate for consultation. The forthcoming MOA between EPA and ADEQ – which EPA would execute prior to Consultation under EPA's current approach – is a legally required prerequisite to approving ADEQ's program and is a legally binding agreement between the EPA and ADEQ. Accordingly, this forthcoming MOA will clearly and significantly affect tribal interests because it will specify which types of state-issued permits the EPA will review and potentially object to, and which types of permits it will not. In these circumstances, executing such an MOA before engaging in consultation would blatantly violate EPA's consultation and trust obligations. (We understand that EPA and ADEQ have already begun preparing the MOA, which further supports the need for EPA to engage in consultation as soon as possible.)

EPA's Consultation Policy further instructs that EPA is to take into account timing "considerations" and "constraints" during the very first phase of consultation. Here, the Clean Water Act requires EPA to approve or deny a state's application within 120 days of receipt of a complete application. A statutory 120 day decision deadline is the precise type of timing consideration and constraint that precludes EPA from delaying consultation until after that 120-day clock begins to run.

Moreover, as EPA is well aware, and as its Consultation Policy expressly recognizes, consultation is a back and forth process that often entails multiple meetings, communications, exchanges of information, and both agency and tribal feedback. EPA's Consultation Policy States:

> Tribes provide input to EPA on the consultation matter. This phase may include a range of interactions including written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. During this phase, EPA considers the input regarding the activity in question. EPA may need to undertake subsequent rounds of consultation if there are significant changes in the originally-proposed activity or as new issues arise.[10]

This process that is critical for ensuring meaningful tribal consultation can, and in many cases does, exceed 120 days. Indeed, given that consultation often occurs between Tribal Officials and EPA Senior Officials, it can take weeks even to schedule a consultation meeting. And to strain

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[9] 40 CFR 233.13(a).
[10] Consultation Policy at 5.

resources further, during the 120 days here, the EPA will be required to solicit public and agency comments, hold a public hearing, and review, analyze and determine whether to approve ADEQ's application. (*It stands to reason that one of the only reasons this 120 day decision deadline is workable for EPA is because the agency has been discussing and negotiating the MOA and program that would be approvable prior to receiving the State's application, which again underscores the need for consultation during the decision-making process.*)

The Community understands that EPA intends to hold a listening session on October 23, 2019, during the EPA Regional/Tribal conference at the Ak-Chin Indian Community. While Community representatives will likely attend and provide input, we want to underscore that such a listening session does not constitute Government-to-Government consultation.

II. EPA's Compliance with Section 106 Further Weighs Against Delaying Consultation

One of the greatest threats from ADEQ assuming a Section 404 permitting program is the loss of protections to historic properties, including cultural resources, Traditional Cultural Properties, and Traditional Cultural Landscapes, that Section 106 protects under USACE's permitting program.

Section 106 requires federal agencies to consider, consult on, and resolve the effects of their actions on historic and cultural resources. Under a state program, however, ADEQ's issuance of a Section 404 permit would no longer constitute a federal undertaking that triggers Section 106 compliance and protections, nor provides safeguards, such as the ability for Tribes to appeal to the Advisory Council on Historic Preservation.[11]

It is the position of ADEQ and SHPO, however, that Arizona's state historic preservation law can protect such historic and cultural resources. While ADEQ and the SHPO have not yet fully identified details of the State's historic preservation program, based upon the Roadmap and recent ADEQ and SHPO statements, the Community is concerned that several important adverse impacts to historic and cultural resources may occur even with a state program (at least as currently contemplated) in place. Concerns include:

- Certain NHPA-protected resources may lose protections under Arizona's program due to state law limitations, such as traditional cultural properties or properties eligible for listing on the National Register of Historic Places but not yet listed;

- ADEQ's narrow interpretation that it can only consider effects within Waters of the United States could mean that historic and cultural resources impacted by a permitting action (e.g. by resulting flooding or changes in drainage patterns) but that are located outside of such waters will remain unprotected;

- The Arizona SHPO has stated that the State's program does not require (and may not provide ADEQ with authority to require) permittees to mitigate or resolve adverse effects;

- It is unclear how, if at all, the Arizona program would provide for tribal consultation and/or a formal and substantive role for Tribal Historic Preservation Officers (THPO); and

[11] *See, e.g., Menominee Indian Tribe of Wisc. v. U.S. EPA*, 360 F.Supp.3d 847 (E.D.Wis. 2018).

- ADEQ has stated that it interprets state law narrowly so as to limit its ability to consider factors or provide protections that are currently a part of the USACE-implemented permitting process.

These are some of the additional issues that the Community seeks to address with EPA during consultation, and that require more than 120 days at the tail-end of the decision-making process to discuss and resolve.

Federal law does, however, require EPA to comply with Section 106 before approving an ADEQ permitting program, as such approval is a federal undertaking within the scope of the NHPA.[12] The Advisory Council on Historic Preservation, in its Preamble to the Section 106 regulations, has stated:

> [I]it is the opinion of the ACHP that the Federal agency approval and/or funding of such State-delegated programs does require Section 106 compliance by the Federal agency, as such programs are ''undertakings'' receiving Federal approval and/or Federal funding. Accordingly, Federal agencies need to comply with their Section 106 responsibilities regarding such programs before an approval and/or funding decision on them.[13]

Similarly, in one of the leading cases regarding the NHPA's applicability to state delegated and authorized permitting programs, the D.C. Circuit noted, and quoted, appellants' concession that federal approval of a program may be subject to Section 106 even if individual permit actions are not.[14]

Like Government-to-Government consultation, Section 106 mandates its own separate, but equally important, consultation process, in this case involving ADEQ, EPA, SHPO, and THPOs. Also similar, especially in the face of a state permitting process that will eliminate Section 106 requirements and protections in connection with issuance of Section 404 permits, the Section 106 Consultation process cannot be completed in 120 days, and thus needs to be initiated immediately. This is especially true because EPA's Section 106 compliance will very likely require the parties to negotiate, draft, and execute a Section 106 Programmatic Agreement, which can require many months to complete.[15]

For the foregoing reasons and in light of the foregoing concerns, Government-to-Government consultation between the EPA and the Community and EPA's Section 106 compliance should

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[12] *See* 54 U.S.C. § 300320; 54 U.S.C. § 306108.

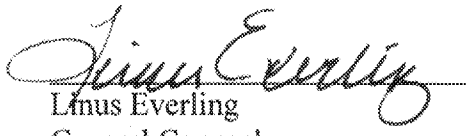
[13] *Protection of Historic Properties*, 69 Fed. Reg. 40,544, 40,546 (Jul. 6, 2004).

[14] *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003).

[15] *See Protection of Historic Properties*, *supra* n. 13 at 40,546: "Due to the inherent difficulties in prospectively foreseeing the effects of such programs on historic properties at the time of the program approval and/ or funding, the ACHP believes that Section 106 compliance in those situations should be undertaken pursuant to a program alternative per 36 CFR 800.14. For example, that section of the regulations provides that ''Programmatic Agreements'' may be used when ''* * * effects on historic properties cannot be fully determined prior to approval of an undertaking; [or] ... when nonfederal parties are delegated major decision making responsibilities .... '' 36 CFR 800.14(b)(1)."

occur as soon as possible, in order to best ensure that adverse effects on the Community's interests are minimized and that the EPA can fulfill its statutory and trust obligations.

Sincerely,



Linus Everling
General Counsel

cc:

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